UNITED STATES
v.
RAY L. PRUETT &
FREIDA C. PRUETT

IBLA 70-143 Decided July 15, 1971

Mining Claims: Contests--Rules of Practice: Government Contests

Under the Department's regulations governing government contests against mining claims, where an answer to a complaint is filed even one day late, the allegations of the complaint will be taken as admitted by the contestee and the case will be decided without a hearing by the land office manager.

Administrative Practice

The ruling in Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969), that the regulation reciting an appeal "will be subject to summary dismissal" when the statement of reasons for the appeal is not timely filed permits the exercise of discretion, does not apply to the regulation requiring timely filing of an answer to a contest complaint, as the language of the latter regulation is mandatory.

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IBLA 70-143	:	Contests N 653-A,
	:	653-B, 653-C
UNITED STATES		
v.	:	Mining claims declared
RAY L. PRUETT &	:	null and void
FREIDA C. PRUETT		
	:	Affirmed

DECISION

Ray L. Pruett and Freida C. Pruett have appealed to the Secretary of the Interior from a decision of the Chief, Branch of Mineral Appeals, Office of Appeals and Hearings, Bureau of Land Management, dated April 17, 1970, which affirmed a Nevada land office decision of February 16, 1970, declaring their Mary Lou #1, Klondike King #1, and Klondike King #2 placer mining claims null and void because of the appellants' failure to file timely answers to the Government's contest complaints against the claims.

A separate complaint was issued against each claim by the Nevada land office requesting that each claim be declared null and void.

The complaints for two of the claims were served on the contestees on December 22, 1969, and, as to the third claim, on December 23, 1969. Therefore, the 30-day period allowed for filing answers expired on January 21 and 22, 1970, respectively. On January 23, 1970, contestees' attorney transmitted a telegram, which was received in the land office on the same date, denying each and every charge in the three complaints. Formal answers to the complaints were filed in the land office on January 29, 1970.

In the instant appeal, as they did before the Office of Appeals and Hearings, Bureau of Land Management, the appellants contend that, under the rule of Tagala v. Gorsuch, 411 F. 2d 589 (9th Cir. 1969), it is discretionary with the Secretary whether to accept the answers herein, filed, respectively, one and two days late. Appellants contend that the failure to exercise discretionary action would result in taking property without due process of law, and is arbitrary and capricious. Appellants also

submit a list of reasons for the delay. They note that they were served with the complaints just before Christmas, that after Christmas appellant Ray L. Pruett was away from his home state, and that after New Year's whenever he tried to see his attorney he was out of town. Finally, although he tried, Mr. Pruett was unable to talk to his attorney until January 23.

The applicable regulations are as follows:

43 CFR 1852.1-6, 1/ 35 F. R. 9528 (June 13, 1970), provides:

> Within 30 days after service of the complaint or after the last publication of the notice, the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint, together with proof of service of a copy of the answer upon a contestant as provided in § 1852.1-5(b)(3). The answer shall contain or be accompanied by the address to which all notices or other papers shall be sent for service upon contestee.

43 CFR 1852.1-7(a), 2/ 35 F. R. 9528 (June 13, 1970), provides:

> (a) If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decided [sic] the case without a hearing.

The contest complaint form bears in italics near the end thereof this statement:

1/ This regulation is now substantially embodied in 43 CFR 4.450-6, 36 CFR 7203 (April 15, 1971).

2/ This regulation is now substantially embodied in 43 CFR 4.450-7, 36 F. R. 7203 (April 15, 1971).

> Unless contestee(s) (file) an answer to the complaint in such office within thirty (30) days after service of this notice and complaint, the allegations of the complaint will be taken as admitted and the case will be decided without a hearing. Any answer should be filed in accordance with Title 43, Code of Federal Regulations, Part 1852.1 a copy of which is attached.

The Department has consistently held that absolute compliance with the terms of these regulations is required. United States v. J. Hubert Smith, 67 I.D. 311 (1960); United States v. George Ernsbarger, 1 IBLA 83 (1970) and cases cited therein. Moreover, reasons for delay similar to those advanced by appellant Pruett were rejected by the Department in United States v. J. Hubert Smith, supra, at 312.

With respect to the argument that Tagala, supra, is a precedent for the acceptance of the late answer being discretionary, it is noted that Tagala involved the regulation at 43 CFR 1840.0-7 and 1842.5-1 3/ requiring the filing within a certain time of a statement of reasons for appeal. The court in that case held that the particular language of the regulation, viz, "that failure to file a statement within 30 days of the taking of the appeal 'will subject the appeal to summary dismissal,'" made the enforcement of the requirement discretionary. But the applicable regulation herein, which states that "Within 30 days after service of the complaint . . . the contestee must . . . file an answer. . . ." is mandatory.

By citing Tagala, appellant is equating the filing of a statement of reasons with the filing of an answer to a contest complaint. As shown below, we believe that the requirement of filing of such an answer is more analogous to that of filing a notice of appeal and that both such requirements are jurisdictional, in contrast to a requirement for the filing of a statement of reasons (or brief).

The distinction between the acceptability of late filings of a statement of reasons (or brief) and a notice of appeal is clearly delineated in Pressentin v. Seaton, 284 F.2d 1950 (D.C. Cir. 1960) as follows:

3/ Since amended and recodified 43 CFR 4.402, 36 F. R. 7200; 43 CFR 4.412, 36 F. R. 7200.

> Certainly rules are made to be followed; that is the essence of the rule of law. But the rule now before us was not a peremptory rule. . . . It did not unequivocally provide that upon a late filing of the statement the appeal would be dismissed. It said that under such circumstances the appeal would be `subject to' dismissal. It left the door wide open to a consideration of circumstances. The situation is a familiar one in the courts, where the timely filing of notices of appeals is jurisdictional and cannot be extended or excused, . . . but the timely filing of subsequent briefs is frequently excused, the time extended, and other measures taken to preserve the substance of the adjudicatory process. . . . (Emphasis supplied.)

In United States v. Robinson, 361 U.S. 220 (1960), the Court discussed a late filing of a notice of appeal under the Federal Rules of Criminal Procedure, stating in part as follows:

> The courts have uniformly held that the taking of an appeal within the prescribed time is mandatory and jurisdictional. . . .
>
> That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision.

In a similar situation involving the late payment of a filing fee, the Department in Joe Lyon, Jr., A-27824 (January 14, 1969) stated:

> The appellant has requested the Secretary to reinstate his appeal and consider the case on its merits under the rule which permits an extension of time or in the exercise of his supervisory authority. It has already been

> noted that the rule which describes the process of perfecting an appeal forbids an extension of the time for paying the filing fee. The appellant has merely asked to be relieved of the consequences of his failure to proceed in accordance with the rules. Strict observance of the rules of practice is necessary to insure orderly procedure to all litigants before the Department. Otherwise, the rules become only the whim of the person who administers them for the nonce. United States v. E. V. Pressentin et al., A-27495 (April 2, 1958).

Compare King v. Mitchell, 214 P.2d 993 (Or. 1950), 16 A.L.R.2d 1128, where the statute permitted the exercise of discretion in accepting late filings.

Accordingly, we find that appellants' answer, because it was late, cannot be accepted, that the complaint is taken as admitted, and that the land office manager correctly declared the contested claims null and void.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decision appealed from is affirmed.

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Anne Poindexter Lewis, Member

We concur:

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Newton Frishberg, Chairman

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Frederick Fishman, Member